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PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions pertinent to this matter are:

1. The Eleventh Amendment to the United States Constitution which provides, "The judicial power of the United States shall not be construed or extended to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign states.

2. Sections 2 and 4 of Article VI and Section 3 of Article VI of the Ohio Constitution which provides:

> "Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts."

3. Section 3301.07, Ohio Revised Code (Appendix).

STATEMENT OF THE CASE

This action was commenced in the Common Pleas Court of Belmont County, Ohio, on the complaint of John and Ruth Kuklevich. The complaint alleged that John Kuklevich sustained personal injuries while a paid spectator at a high school football game held on the premises of the Union Local School District. Ruth Kuklevich claimed damages for loss of service and consortium.

Union Local School District moved to dismiss the complaint on the grounds that Plaintiffs had failed to state a claim for which relief could be granted, asserting that it is a board of education organized and operating under the laws of the State of Ohio and not subject to suit in tort by reason of the doctrine of governmental immunity. That motion was sustained by the Court of Common Pleas and Plaintiffs appealed to the Court of Appeals of Belmont County, asserting as the sole assignment of error: "The court below erred in granting Defendant's motion to dismiss Plaintiffs' complaint on the ground of sovereign immunity." The Court of Appeals affirmed the dismissal, holding that the Union Local School District is an instrumentality of the State of Ohio and that the State has not consented to suits in tort against boards of education.

The Ohio Supreme Court subsequently

granted a motion to certify the record and, following submission of briefs and oral argument, dismissed the appeal as having been improvidently granted.

The sole issue raised by the Petition for a Writ of Certiorari is whether the United States Constitution requires the state of Ohio to entertain suits in tort against boards of education. Respondent contends that there is no substantive constitutional right to maintain suit in tort against the state of Ohio and its instrumentalities and that the application of Ohio's rule of governmental immunity as a bar to this action has not deprived Petitioner of any right guaranteed by the Fourteenth Amendment.

ARGUMENT

PETITIONER HAS NOT BEEN DEPRIVED OF ANY RIGHT GUARANTEED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

1. **There is no substantive constitutional right to maintain a suit in tort for money damages against the State of Ohio or its instrumentalities. (Response to Petitioners Arguments A & B).**

Both the State of Ohio and its instrumentalities are immune from tort liability for money damages. Krause v. The State of Ohio, 31 Ohio St. 2d 132, 285, N. E. 2d 736 (1972) appeal dismissed 409 U. S. 1052, reh. denied 410 U. S. 918; Thacker v. Board of Trustees of The Ohio State University, 35 Ohio St. 2d 49, 298 N. E. 2d 542 (1973).

Ohio Courts have consistently held that boards of education are instrumentalities of the state and immune from tort liability in the absence of legislative consent. In Finch v. Board of Education of City of Toledo, 30 Ohio St. 37 (1876), the Ohio Supreme Court held:

> "A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school,

from its negligence in the discharge of its official duty in the erection or maintenance of a common school building under its charge, in the absence of a statute creating liability."

As in the instant case, Finch involved an action for damages for personal injuries resulting from alleged negligence of school officials. A similar conclusion was reached by the Ohio Supreme Court in Board of Education of Cincinnati v. Volk, 72 Ohio St. 469, 74 N. E. 646 (1905), where the Court held that a board of education was not amenable to suit for alleged negligence in conducting an excavation on school property.

> "As the citizen cannot sue the state without its consent, expressed by legislation, its agents, the board of education, cannot be sued and made liable for damages without consent of the sovereign, expressed by pertinent legislation." Volk, supra, 72 Ohio St. 469, 485.

The same result was obtained in a case involving facts nearly identical to those of the instant case where the Court of Appeals of Franklin County held:

> "A board of education is not liable in its corporate capacity for damages for an injury resulting to one from the collapse of bleacher

> seats on school property even though the injured person paid an admission fee to occupy one of the seats." Shaw v. Board of Education of City School District of Columbus, 17 Ohio L. Abs. 588 (1934) motion to certify overruled, October 3, 1934.

In a more recent case, again involving the question of tort liability of boards of education, the same Court of Appeals again stated:

> "The board of education of a school district is a governmental agency of the state, and in the performance of its authorized duties or functions it is immune from suit except by consent of the state or by expression of legislation." Hall v. Columbus Board of Education, 32 Ohio App. 2d 297, 290 N. E. 2d 580 (1972) motion to certify overruled, September 14, 1972.

A review of these cases demonstrates that boards of education, as instrumentalities of the state, are immune from tort liability to the same extent and for the same reasons as the state itself.

> ". . .A board of education is a body corporate and politic of the State of Ohio, and, therefore, a suit against the board is plainly a suit

against the government and its property." Wayman v. Board of Education, 5 Ohio St. 2d 248, 249, 215 N. E. 2d 394 (1966).

The application of the rule of governmental immunity to the state and its instrumentalities is based upon the absence of consent by the General Assembly to suit in tort. While different rules are applied to municipal corporations because they enjoy a measure of independent sovereignty, the immunity of both the state and state instrumentalities from tort liability is applied regardless of the nature of the activity giving rise to the injury. Thacker, supra.

The concept of governmental immunity originated in the common law and predates the United States Constitution. The Eleventh Amendment, however, carries into the Constitution the principle that the sovereign states may refuse to be sued in their own courts and may also refuse to be sued in the federal courts. The United States Supreme Court has held that the Fourteenth Amendment guarantees of Equal Protection and Due Process of law do not include a constitutionally protected right to maintain suit against the State of Ohio.

"The right of individuals to sue a state, in either a federal or a state court, cannot be derived from the Constitution or laws of

the United States. It can come only from the consent of the state." Palmer v. Ohio, 248 U. S. 32 (1918).

The State of Ohio has not consented to suits in tort against boards of education. There is no substantive constitutional right to maintain such suits and Petitioner has not been deprived of due process of law.

II. The retention of governmental immunity from suit in tort for money damages by the state of Ohio does not deprive Petitioner of any right guaranteed under the Equal Protection Clause of the Fourteenth Amendment.
(Response to Petitioners Argument A.

Just as the state may hold itself immune from suit by its citizens so, also, it may consent to be sued and determine the conditions under which such suits may be permitted. Parden v. Terminal Railway Co., 377 U. S. 184 (1963). Consent to suit, however, is not presumed and will only be found ". . .when stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." Edelman v. Jordan, ___U. S.___, ___42 U. S. L. W. 4419, 4425 (1974) quoting from Murray v. Wilson Distilling Company, 213 U. S. 151, 171 (1909)

Waiver of governmental immunity is the prerogative of the sovereign states and the determination of whether or not a state has waived immunity from suit is a matter of state law. Palmer, supra. Corbean v. Xenia City Board of Education, 366 F. 2d 480 (C. A. 6, 1966) cert. denied 385 U. S. 1041; Harris v. Tooele County School District, 471 F. 2d 218 (C. A. 10, 1973);

Brennan v. University of Kansas, 451, F. 2d 1287 (C. A. 10, 1971); Aerojet-General Corporation v. Askew, 453 F. 2d 819 (C. A. 5, 1971) cert. denied 409 U. S. 892; O'Neill v. Early, 208 F. 2d 286 (C. A. 4, 1953)

The state of Ohio has the sovereign power to waive or retain immunity from suit without constitutional restraint. It is clear that the State of Ohio has not waived the immunity of either the state or its instrumentalities from suits in tort for money damages. * Palmer, supra; Krause, supra; Thacker, supra. Petitioner argues, however, that the fact that Ohio has waived immunity from suit in some instances while remaining immune from suit in tort for money damages deprives him of equal protection of law. This court has rejected the proposition that the Equal Protection Clause requires that a plaintiff be afforded rights not otherwise secured by the United States Constitution.

> "It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of laws." San

---

*The state of Ohio has, legislatively, waived its immunity from suit as of January 1, 1975 by the passage of Am. Sub. H. B. 800. The new legislation specifically retains the common law sovereign immunity of boards of education.

Antonio Independent School District v. Rodriguez, ____U. S.____, _____
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To the extent that the state has waived immunity from suit, the waiver has been limited to actions (1) based upon contract, or (2) in which only injunctive relief is sought.

If this limited waiver constitutes a classification, it is a classification of remedy and not a classification of persons. The law of Ohio is uniformly applied to the end that all tort actions for money damages against the State of Ohio and its instrumentalities, including boards of education, are barred. Equal protection of law does not require those matters which are different in substance to be treated as though they were alike. Krause, supra. There is reasonable basis for the State of Ohio to restrain the tort plaintiff's hand from the tax revenues of the state and its agencies and the application of the doctrine of governmental immunity as a bar to Petitioner's claim has not denied him equal protection of law.

III. Application of the doctrine of governmental immunity as a bar to tort actions for money damages against boards of education in Ohio does not deprive Petitioner of equal protection or due process of law.
(Response to Petitioners Argument B).

The task of providing free public education for the youth of Ohio is one which the people of Ohio have, by their constitution, made a function of state government. Section 3 of Article VI of the Ohio Constitution provides, in part:

> "Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds:. . ."

Other provisions of the Ohio Constitution provide for the funding of public education and control of local schools under the supervision of a state board of education (Sections 2 and 4 of Article VI, Ohio Constitution, Appendix).

Pursuant to these and other constitutional provisions the General Assembly has developed a system of laws governing the operation of public schools in this state. At the pinnacle of this hierarchy is the State Board of Education which, "shall exercise under the acts of the

legislature, general supervision of the system of public education in the State of Ohio. . . ." Section 3301.07, Ohio Revised Code, Appendix. Among its many responsibilities, the State Board of Education is charged with supervision of the allocation of state funds to local school districts, prescribing minimum standards to be maintained in schools, approving transfers of territory between school districts, and providing a system of accreditation of teachers.

Not only does the State of Ohio take a direct hand in the supervision of public education in this state, it also provides a substantial portion of the funding for public education through the direct payment of state monies to local schools under the school foundation program. In view of the massive, direct involvement of the state in the public educational system, it is clear that there is ample justification for the consistent holdings of the Ohio Supreme Court as well as the Court of Appeals holding in this case that:

> ". . .in the absence of a statute creating liability boards of education enjoy the protection of governmental immunity from liability in damages its negligent acts or omissions to act." (Petitioner's brief, Appendix "A", page 23)

The Ohio Supreme Court has rejected the argument that Ohio's rule of governmental immunity denies equal protection of law.

> ". . .Nor is the withholding of a legal remedy from persons injured by the state, while allowing a remedy for nongovernmental tortious activity, discriminatory governmental action. 'The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' Tigner v. Texas (1940) 310 U. S. 141, 147. '***the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways.' Reed v. Reed (1971) ____U. S.____,____, 30 L. Ed. (2d) 225, 229. Assuming, arguendo, that there is in fact a classification, it is one which the General Assembly is empowered to make." Krause, supra, 31 Ohio St. 2d 132, 145. See, also, Harris v. Pennsylvania Turnpike Commission, 410 F. 2d 1332 (C. A. 3, 1969), cert. denied 396 U. S. 1005.

Petitioner has offered no authority for the proposition that the Equal Protection Clause denies the sovereign states the power to deter-

mine those areas of governmental activity which are immune from tort liability. Each of the cases cited in support of Petitioner's argument that ". . .inferior agencies of the state may not assume the state's sovereignty" (page 13, Petitioner's brief) involved actions in federal courts against agencies which were subject to suit in their own state courts. That is not the case presented here. In this case Petitioner's action is clearly barred by the law of Ohio and the issue is whether the United States Constitution requires Ohio to consent to the suit.

If boards of education in Ohio are to be subjected to tort liability, the decision must come from those who must ultimately bear the burden, the electors of Ohio through the General Assembly. The declaration of state sovereignty contained in the Eleventh Amendment secures that right and it should not be withdrawn under the guise of securing equal protection of law.

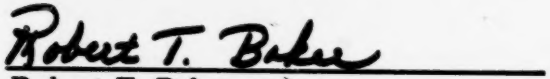
While not specifically argued, Petitioner has cited sections 3313.201 and 3313.17 of the Ohio Revised Code as being relevant to his claim. It should be noted that section 3313.201, while authorizing the purchase of liability insurance for liability arising out of the operation of a motor vehicle, does not expressly waive the governmental immunity of a board of education. Any waiver of immunity which might be implied from this section must necessarily be limited to matters arising out of the operation of motor vehicles. Boards of education have no authority to insure against the liability

asserted by Petitioner in his complaint. Similarly, section 3313.17 of the Ohio Revised Code has not been construed as a waiver of the board's immunity from tort liability. Volk, supra; Brown v. Board of Education, Monroeville Local School District, 20 Ohio St. 2d 68, 253 N. E. 2d 767 (1968). In the absence of specific legislative consent, boards of education are, and should remain immune from tort liability in the Ohio courts.

CONCLUSION

Petitioner has presented no substantial federal question for review by this Court. The United States Constitution, prior decisions of this Court, and law of the State of Ohio clearly demonstrate that a citizen of Ohio has no constitutionally protected right to maintain an action, in tort, against the State of Ohio or a board of education of the State of Ohio. The Petition for a writ of certiorari should be denied.

Respectfully submitted,



Robert T. Baker

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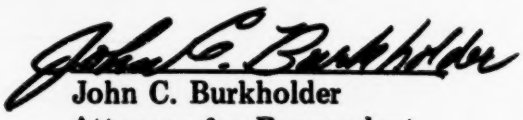
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari was sent by regular United States mail to Richard L. Lancione of the firm of Lancione, Lancione & Lancione, Attorney for Petitioners, 38th and Jefferson Streets, Bellaire, Ohio, 43906, on this 23rd day of August, 1974.



John C. Burkholder
Attorney for Respondent

APPENDIX

Ohio Constitution, § 2, Article VI

Common school fund to be raised; how controlled.

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.

Ohio Constitution, § 4, Article VI

State board of education; superintendent of public instruction.

There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Ohio Revised Code, § 3301.07

3301.07 Powers of state board.

* * *

The state board of education shall exercise under the acts of the legislature general supervision of the system of public education in the state of Ohio. In addition to the powers otherwise imposed on the state board under the pro-

visions of law, such board shall have the following powers:

(A) It shall exercise policy forming, planning and evaluative functions for the public schools of the state, and for adult education, except as otherwise provided by law.

(B) It shall exercise leadership in the improvement of public education in Ohio, and shall administer the educational policies of this state relating to public schools, and relating to instruction and instructional material, building and equipment, transportation of pupils, administrative responsibilities of school officials and personnel, finance and organization of school districts and territory. Consultative and advisory services in such matters shall be provided by the board to school districts of this state.

(C) It shall administer and supervise the allocation and distribution of all state and federal funds for public school education under the provisions of law, and may prescribe such systems of accounting as are necessary and proper to this function. It may require county auditors and treasurers, boards of education, clerks of such boards, teachers, and other school officers and employees, or other public officers or employees, to file with it such reports as it may prescribe relating to such funds, or to the management and condition of such funds.

(D) It shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality. Such standards shall provide adequately for: a curriculum sufficient to meet the needs of pupils

in every community; the certification of teachers, administrators and other professional personnel and their assignment according to training and qualifications; efficient and effective instructional materials and equipment, including library facilities; the proper organization, administration and supervision of each school, including regulations for preparing all necessary records and reports and the preparation of a statement of policies and objectives for each school; buildings, grounds, health and sanitary facilities and services; admission of pupils, and such requirements for their promotion from grade to grade as will assure that they are capable and prepared for the level of study to which they are certified; requirements for graduation; and such other factors as the board finds necessary.

In the formulation and administration of such standards for nonpublic schools the board shall also consider the particular needs, methods and objectives of said schools, provided they do not conflict with provision of a general education of a high quality and provided that regular procedures shall be followed for promotion from grade to grade of pupils who have met the educational requirements prescribed.

(E) It shall formulate and prescribe minimum standards for driver education courses conducted at high schools in the state. In the formulation of standards for driver education courses, it shall call upon the director of highway safety for advice and assistance.

(F) It shall prepare and submit annually to the governor and members of the general assembly a report on the status, needs and major

problems of the public schools of the state of Ohio, with recommendations for necessary legislative action.

(G) It shall prepare and submit to the director of budget and management the biennial budgetary requests of the state board of education, for its agencies and for the public schools of the state.

(H) It shall cooperate with federal, state and local agencies concerned with the health and welfare of children and youth of the state of Ohio.

(I) It shall require such reports from school districts, school officers, and employees as are necessary and desirable. The superintendent and clerk of a school district shall certify as to the accuracy of all reports required by law or state board or state department of education regulations to be submitted by the district and which contain information necessary for calculation of state funding. Any superintendent who knowingly falsifies such report shall be subject to certificate revocation pursuant to section 3319.31 of the Revised Code. The state board of education shall adopt rules and regulations governing the purchasing and leasing of data processing services and equipment for all local, exempted village, city, county, and joint vocational school districts.

(J) It may adopt such rules and regulations as are necessary for the carrying out of any function imposed on it by law, and may provide such regulations as are necessary for its government and the government of its employees, and may delegate to the superintendent of public instruc-

tion the management and administration of any function imposed on it by law.

(K) It may provide for the appointment of board members to serve on temporary committees established by the board for such purposes as are necessary. Permanent or standing committees shall not be created.

Letter Extending Time to
File Brief

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 15, 1974

Nicholas A. Pittner, Esq.
Means, Bichimer, Burkholder & Baker
50 West Broad Street, 35th Floor
Columbus, Ohio 43215

Re: John Kuklevich, et ux. v. Union Local School District, No. 73-2033

Dear Mr. Pittner:

Your request of August 12, 1974, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted, and the time has been extended to and including August 26, 1974.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson

Francis J. Lorson
Deputy Clerk

cc: Richard J. Lancione, Esq.
38th & Jefferson Streets
Bellaire, Ohio 43906